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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

LT GAME INTERNATIONAL LTD.,

Plaintiff,

vs.

SHUFFLE MASTER, INC.,

Defendant.

Case No.: 2:12-cv-01216-JAD-GWF

**REPLY IN SUPPORT OF MOTION TO
 DISMISS THIRD AMENDED
 COMPLAINT, OR IN THE
 ALTERNATIVE, MOTION FOR
 SUMMARY JUDGMENT**

I. INTRODUCTION

Although this Court granted LT Game International Ltd. ("LT Game International") leniency in allowing it to file a Third Amended Complaint sight unseen, it provide a stern warning that LT Game International "should err on the side of being overly inclusive and descriptive of the how, what and why" when doing so. LT Game International failed to heed this Court's admonition and filed a Third Amended Complaint with hollow allegations of "false statements" made by still unidentified representatives of Shuffle Master, Inc. ("SHFL"). Instead of defending the allegations pled in its Third Amended Complaint, LT Game International's Opposition weaves a fantastical tale without evidentiary support. LT Game International has failed to plead sufficient facts to state actionable claims against SHFL and has otherwise failed to present this Court with admissible evidence sufficient to raise any triable issue of fact. As such, the Court should dismiss LT Game International's Third Amended Complaint or otherwise enter summary judgment against those claims and dispose of this case in its entirety.

1 **II. DISCUSSION**

2 **A. The Third Amended Complaint Does Not Satisfy FRCP 9(b).**

3 **1. *All of LT Game International's Claims Sound in Fraud.***

4 Ignoring this Court's articulate decision and in effect conceding the merit of SHFL's
5 Motion to Dismiss, LT Game International argues that it is not required to plead any of its claims
6 with particularity and makes no effort to demonstrate that it has complied with FRCP 9(b). (Opp.,
7 26:6-18.) In support of its contention, LT Game International makes the unsupportable assertion
8 that the "Third Amended Complaint does not contain any 'fraud-based' averments." Nonsense.

9 As this Court recognized, whether a claim sounds in fraud is not triggered by the use of
10 certain buzzwords. (Dkt. #112, Order at 5:21-6:13.) Instead, the Court must analyze the claims
11 to determine whether they are "grounded in fraud." (*Id.* at 6:4-6); *See Vess v. Ciba-Geigy Corp.*
12 *USA*, 317 F.3d 1097, 1102-06 (9th Cir. 2003). Not only did this Court explain that other courts
13 have found that unfair competition claims based on false statements are subject to Rule 9(b), it
14 questioned whether any Lanham Act false advertising claim could escape the requirements of
15 Rule 9(b). (Dkt. #112, Order at 6 n. 16.) As the Court surmised:

16 Indeed, it is likely that most false advertising claims under §1125(a)(1)(B) will
17 trigger Rule 9(b) scrutiny because the first prong of the standard requires alleging
18 that the defendant made a 'false' statement and, thus, the plaintiff will allege either
19 that a 'false' representation was made with the intent to deceive (fraud), or that the
20 false representation was made unwittingly, without the intent to deceive (mistake).

21 Such is precisely what LT Game International has done in this case. [REDACTED]

22 [REDACTED] (Dkt. 115, Third Amended Complaint ("TAC") at ¶¶

23 45-47.)¹ [REDACTED]

24 [REDACTED] (*Id.* at ¶¶ 51-52, 57, 62; *see also*

25 Opp., 16:11-15 (explaining that its claim under Macau law is predicated on the "making or
26 broadcast of statements").) Contrary to LT Game International's belief, it cannot circumvent its

27 ¹ Citations are to the sealed version of the Third Amended Complaint.
28

1 requirement to plead claims with particularity simply by not drafting around the words "fraud" and
 2 "misrepresentation." *Vess*, 317 F.3d at 1102-06; *see also* Dkt. 112, Order at 5:12-6:13. LT Game
 3 International fell woefully short in its pleading requirements and its Opposition fails to even make
 4 an attempt to demonstrate that Rule 9(b)'s requirements were met.

5 **2. *LT Game International Does Not Plead the Who, What, When, Where and***
 6 ***How of the Allegedly False Statements.***

7 Forgetting the allegations advanced in its first three failed complaints, LT Game
 8 International dropped references to the supposed "misrepresentations" regarding the "nature and
 9 quality" of LT Game International's products in its latest complaint.² [REDACTED]

10 [REDACTED]
 11 [REDACTED] (Dkt. 115, TAC at ¶¶ 29-32, 35-
 12 39, 45-47.)³ As to any of these purported statements, LT Game International makes no effort to
 13 plead who made those statements, when those statements were made, or even how those
 14 statements are false. LT Game International's vague allegations regarding statements purportedly
 15 made by unnamed "SHFL" representatives are insufficient as a matter of law and its fraud-based
 16 claims should be dismissed. *Vess*, 317 F.3d at 1102-06.

17 **B. LT Game International Failed To Plead An Actionable False Statement To**
 18 **Support Its Lanham Act Claim.**

19 Even if LT Game International had pled its claims with the requisite particularity (which it
 20 has not) it has still not pled any actionable false statements to support its Lanham Act or related

21
 22 ² Without any authority, LT Game International invites this Court to disregard the limitations imposed on
 23 LT Game International requiring it to plead facts consistent with its prior pleadings. It does so by arguing
 24 that SHFL should have found out through discovery that LT Game International had no intention of
 25 prosecuting claims consistent with the allegations alleged in its first three complaints. (Opp. at 2 n.1.) That
 26 is not the law. *See Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296-97 (9th Cir. 1990) ("Although leave to
 amend should be liberally granted, the amended complaint may only allege other facts consistent with the
 challenged pleading."); *Bradley v. Chiron Corp.*, 136 F.3d 1317, 1324-26 (Fed.Cir.1998) (disregarding
 "sham" facts in an amended complaint that contradicted the factual allegations pled in the original and
 represented "a transparent attempt to conform the facts to the requirements of the cause of action").

27 ³ The one fraud-based allegation pled with any particularity concerns an e-mail string between SHFL's then-
 28 CEO and a trade organization. (Dkt. 115, TAC at ¶ 40-41.) As addressed below, such a statement is not
 actionable as a matter of law.

1 unfair competition claims.⁴ As vaguely alleged in its Third Amended Complaint and further
 2 articulated in its Opposition, LT Game International predicates its claims on three categories of
 3 false statements: (1) statements to customers as to LT Game International's ability to sell products
 4 outside of Macau; (2) statements that LT Game International's products may infringe patents; and
 5 (3) statements of opinion to a non-customer about the business practices of a non-party. No such
 6 statements are actionable under the Lanham Act.

7 ***1. The Statements Did Not Constitute Advertising Or Promotion.***

8 In order to support a claim for false advertising, LT Game International was required to
 9 plead, and ultimately provide sufficient facts to demonstrate, that SHFL made false statements "in
 10 commercial advertising or promotion." *Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*,
 11 173 F.3d 725, 735 (9th Cir. 1999). "While the representations need not be made in a 'classic
 12 advertising campaign,' but may consist instead of more informal types of 'promotion,' the
 13 representations must be disseminated sufficiently to the relevant purchasing public to constitute
 14 'advertising' or 'promotion' within that industry." *Coastal Abstract Serv., Inc. v. First Am. Title*
 15 *Ins. Co.*, 173 F.3d 725, 735 (9th Cir. 1999) (citation omitted)). Accordingly, the inquiry as to
 16 whether something constitutes "promotion" under the Lanham Act "focuses on the 'relevant
 17 industry' and whether the communication was sufficiently disseminated in that context." *Gonzalez*
 18 *v. Allstate Ins. Co.*, CV 04-1548FMCPJWX, 2005 WL 5891935, *7 (C.D. Cal. Aug. 2, 2005). In
 19 determining if such statements constitute "promotion" within the industry, courts look to see if the
 20 allegedly false statement was disseminated to a "statistically significant part of the commercial
 21 audience" relating to such a statement. *Johnson & Johnson * Merck Consumer Pharm. Co. v.*
 22 *Smithkline Beecham Corp.*, 960 F.2d 294, 298 (2d Cir. 1992). LT Game International has neither
 23 pled, nor provided sufficient evidence, that SHFL's purported false statements were disseminated
 24 wide enough to constitute "advertising" or "promotion" under the Lanham Act.

25
 26 ⁴ The pleading deficiencies relating to the Lanham Act claim are equally applicable to LT Game
 27 International's unfair competition claims under Nevada and Macau law. *See Caesars World, Inc. v.*
 28 *Milanian*, 247 F. Supp. 2d 1171, 1193 (D. Nev. 2003) (recognizing that the elements of a claim for unfair
 competition under Nevada common law "are identical to the elements necessary under section 43(a) of the
 Lanham Act, 15 U.S.C. § 1125(a)."); Macau Com. Code, Chap. II, Art. 162 (requiring the "making or
 broadcast of statements" to support a claim of unfair competition).

At best, LT Game International has alleged that unknown SHFL representatives made statements to three customers: [REDACTED] Based on its unsubstantiated allegations that the gaming market is "close knit" and that "word travels fast" in the industry, LT Game International claims that these few one-off statements are sufficient to constitute "promotion" under the Lanham Act. (Opp., 14:1-15:2.) They are not.

Courts are legion for the proposition that statements made to only a handful of potential customers are not actionable as a matter of law. *William H. Morris Co. v. Grp. W, Inc.*, 66 F.3d 255, 258 supplemented sub nom. *William H. Morris Co. v. Grp. W. Inc.*, 67 F.3d 310 (9th Cir. 1995) (evidence of statements to 8 out of 300 customers insufficient); *Profl Sound Servs., Inc. v. Guzzi*, 349 F. Supp. 2d 722, 728 (S.D.N.Y. 2004) *aff'd*, 159 F. App'x 270 (2d Cir. 2005) (statement to one customer of 36 customers insufficient); *Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc.*, 314 F.3d 48, 58 (2d Cir. 2002) (27 statements insufficient); *Sports Unlimited, Inc. v. Lankford Enterprises, Inc.*, 275 F.3d 996, 1004-05 (10th Cir. 2002) (statements to 2 of 150 customers insufficient).⁵ Although the gaming industry is smaller than some other less-regulated industries, any claim that there are not hundreds, if not thousands, of potential customers for LT Game International's products is patently absurd. Globally, there are in excess of 2,300 gaming facilities offering live dealer table games and far more than 600 separate and distinct corporate/parent operators of those gaming facilities. (Ex. C, M. Hultberg Decl. at ¶¶ 6-7.)⁶ In

⁵ See also *Johnson & Johnson-Merck Consumer Pharm. Co. v. Rhone-Poulenc Rorer Pharm., Inc.*, 19 F.3d 125, 133 (3d Cir. 1994) (a showing that 7.5% of advertising recipients were deceived insufficient); *Premier Comp Solutions, LLC v. Penn Nat. Ins. Co.*, CIV.A. 07-1764, 2012 WL 1038818 (W.D. Pa. Mar. 28, 2012) (statements to five out of hundreds insufficient); *SimplexGrinnell LP v. Integrated Sys. & Power, Inc.*, 642 F. Supp. 2d 167, 203 modified on reconsideration, 642 F. Supp. 2d 206 (S.D.N.Y. 2009) (one statement insufficient); *Walker & Zanger, Inc. v. Paragon Indus., Inc.*, 549 F.Supp.2d 1168, 1182 (N.D.Cal. 2007) (a "handful of statements" insufficient); *Tao of Sys. Integration, Inc. v. Analytical Servs. & Materials, Inc.*, 299 F.Supp.2d 565, 573 (E.D.Va. 2004) ("Where it is clear, however, that the relevant market is large and that the alleged contacts are comparatively trivial, dismissal for failure to state a claim is appropriate."); *Professional Sound Servs., Inc. v. Guzzi*, 349 F.Supp.2d 722, 729 (S.D.N.Y. 2004) (statements to one of 36 customers insufficient).

⁶ The "court may take judicial notice of matters of public record without converting a motion to dismiss into a motion for summary judgment, as long as the facts noticed are not subject to reasonable dispute." *Intri-Plex Techs., Inc. v. Crest Grp., Inc.*, 499 F.3d 1048, 1052 (9th Cir. 2007); *Mack v. S. Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir.1986) (finding that under Federal Rule of Evidence 201, a court may take judicial notice of "matters of public record").

1 fact, there are over 150 gaming facilities offering live dealer table games in the State of Nevada
 2 alone. (Ex. D, Nevada Nonrestricted Count Report.⁷) In light of this "relevant industry,"
 3 statements made to only three of these potential customers does not constitute "promotion" for the
 4 purposes of the Lanham Act. *William H. Morris Co.*, 66 F.3d at 258; *Fashion Boutique of Short*
 5 *Hills, Inc.*, 314 F.3d at 58.

6 Ignoring both the law and the realities of the gaming industry, LT Game International rests
 7 its position on two readily distinguishable case. LT Game International points to *Coastal*
 8 *Abstract Service* and argues that even one false statement can be actionable. (Opp., 14:1-15:2.)
 9 However, in *Coastal Abstract Service*, the Ninth Circuit found that a plaintiff stated a claim under
 10 the Lanham Act where evidence was provided of false statements made to one customer where
 11 "there were only two possibly three" potential customers. 173 F.2d at 735. In light of the unique
 12 circumstances and the fact that statements to one customer in that case potentially represented
 13 statements to 50% of the relevant industry, the court found sufficient evidence to present the
 14 question to the finder of fact. *Id.*

15 Similarly, in *Gonzalez* an insurance salesman who was terminated by Allstate claimed
 16 false advertising when his former employer sent mass mailings to all of his former customers after
 17 his termination. *Gonzalez*, 2005 WL 589135 at **3-6. In essence, defendant in that case made
 18 false statements to the entire "relevant industry" in dispute (*i.e.* plaintiff's former customers). *Id.*
 19 Such conduct is far afield of anything close to the allegations in this matter.

20 Here, all that is alleged are statements allegedly made to three out of the hundreds, if not
 21 thousands, of potential customers in the gaming industry. Such statements do not constitute
 22 promotion as a matter of law and LT Game International's Lanham Act claims fails. *William H.*
 23 *Morris Co.*, 66 F.3d at 258; *Fashion Boutique of Short Hills, Inc.*, 314 F.3d at 58; *see eMove Inc.*
 24 *v. SMD Software Inc.*, No. CV-10-02052-PHX-JRG, 2012 WL 1379063, *5 (D. Ariz. Apr. 20,
 25 2012) ("isolated disparaging statements" are insufficient to constitute "promotion").

26
 27 ⁷ *Id.*; The attached exhibit is publicly available from the Nevada Gaming Control Board, at:
 28 <http://gaming.nv.gov/modules/showdocument.aspx?documentid=3430> (last accessed June 25, 2014).
 Exhibit D is highlighted to reflect each unique gaming facility offering at least one table game.

2. ***Statements Purporting to Interpret the Meaning of Statutes or Regulation Are Not Actionable.***

Although the alleged statements do not constitute "promotion" as a matter of law, those statements are likewise not actionable for additional reasons. As explained in the very authority that LT Game International trumpets in its Opposition, "statements by laypersons that purport to interpret the meaning of a statute or regulation are opinion statements, and not statements of fact." *Coastal Abstract Serv.*, 173 F.3d at 731 (citations omitted). Of course, "[s]tatements of opinion are not generally actionable under the Lanham Act." *Coastal Abstract Serv.*, 173 F.3d at 731 (citations omitted). As demonstrated in *Coastal Abstract Service*, statements by a competitor that another company does not have the requisite license to operate the business it intends to conduct is not actionable as a matter of law. *Id.*, 173 F.3d at 732. ("Thus, even if a California court ultimately concludes that § 17200 does not require that a company in Coastal's position obtain an escrow license, the licensure statement *as a matter of law could not give rise to a Lanham Act claim.*") (emphasis added).

Just like the alleged statements in *Coastal Abstract Service*, LT Game International alleges

(Dkt. 115, TAC at ¶¶ 35, 37, 39, 45.) Of course, there is no reasonable dispute that an entity selling gaming equipment is in fact required to obtain licenses, registrations, or other approvals on a jurisdiction-by-jurisdiction basis in compliance each jurisdiction's gaming laws. For example, Nevada law requires a party to secure registrations before entering into contracts relating to the manufacture, sale or distribution of gaming devices. *See* NRS 463.650 ("[I]t is unlawful for any person . . . to operate, carry on, conduct or maintain any form of manufacture, selling or distribution of any gaming device . . . without first procuring and maintaining all required federal, state, county and municipal licenses."); NGC Reg. 14.260 ("[A] manufacturer or distributor of associated equipment shall not distribute associated equipment unless it has been approved by the chairman."). Most, if not all, other jurisdictions have similar licensure or registration requirements. (Ex. E, Rumbolz Report; Ex. F, Rumbolz Tr., 35:1-25, 39:9-40:11, 78:22-25,

1 81:17-82:12.) Therefore, even if some unknown representative of SHFL made statements
2 regarding LT Game International's ability or inability to sell products outside of Macau, those
3 statements are not actionable as a matter of law. *Coastal Abstract Serv.*, 173 F.3d at 732.

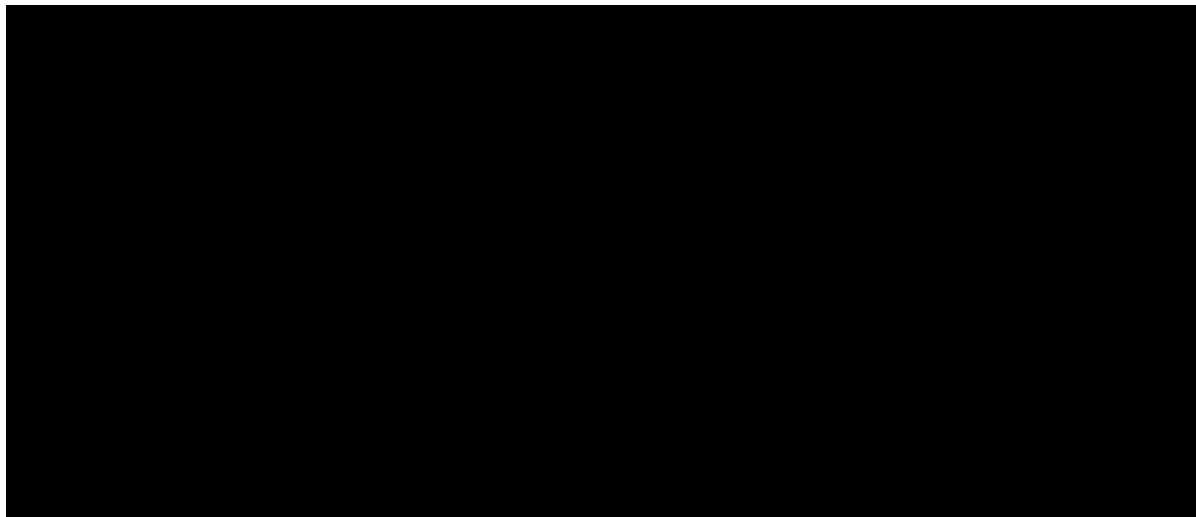
4 **3. *Statements of Opinion to Non-Customers Are Not Actionable.***

5 The last purported false statement upon which LT Game International predicates its claims
6 is an e-mail string between SHFL's former CEO and the director of a trade organization for
7 gaming equipment manufacturers. (Dkt. 115, TAC at ¶¶ 40-41, 45; Opp., 8:19-27.) Even if the
8 Court was to consider these statements despite the infirmities addressed above, they are still not
9 actionable. This is because it is axiomatic that in order to support a false advertising claim a
10 plaintiff is required to demonstrate that the purported false statements were made *to customers*.
11 *See Cancer Genetics, Inc. v. Hartmayer*, CIV. 07-5463(FSH), 2008 WL 323738, *10 (D.N.J. Feb.
12 5, 2008); *see also H & R Indus., Inc. v. Kirshner*, 899 F. Supp. 995, 1003 (E.D.N.Y. 1995).
13 Further, the purported false statement must be one of fact, not opinion. *Coastal Abstract Service*,
14 173 F.3d at 731. LT Game International's allegations and purported evidence regarding these
15 alleged false statements fail on both accounts.

16 As LT Game International acknowledges, Marcus Prater is the Executive Director of the
17 Association of Gaming Equipment Manufacturers ("AGEM"). (Dkt. 115, TAC at ¶ 40.)
18 Nowhere in LT Game International's Third Amended Complaint or its Opposition does it claim
19 that AGEM is a gaming operator or potential customer, nor could it. As explained on its website,
20 AGEM "is a non-profit international trade association representing manufacturers and suppliers of
21 electronic gaming devices, systems, table games, key components and support products and
22 services for the gaming industry." (See Ex. G, "Our Mission," AGEM Website, available at:
23 <http://www.agem.org/index.html> (last viewed June 27, 2014).) As there is no credible argument
24 that AGEM is a customer, any statements, even if false, are not actionable. *Cancer Genetics*,
25 2008 WL 323738 at *10.

26 Moreover, even ignoring the fact that AGEM is not a potential customer as well as the fact
27 that the allegedly false statement concerned non-party LT Game Ltd. ("LT Game"), the purported
28 false statements were merely those of opinion. For example, in the context of defamation,

statements regarding dishonesty or unethical behavior are considered opinions. *See Redco Corp. v. CBS, Inc.*, 758 F.2d 970, 972 (3d Cir.1985); *see also Lewis v. Time Inc.*, 710 F.2d 549, 556 (9th Cir. 1983); *Lauderback v. Am. Broad. Companies, Inc.*, 741 F.2d 193, 198 (8th Cir. 1984); *see also Biber v. Duplicator Sales & Serv., Inc.*, 155 S.W.3d 732, 738 (Ky. Ct. App. 2004). When questioned regarding the substance of the allegedly false statement, Mr. Isaacs explained to LT Game International that he was simply expressing his opinion:



(Ex. H, Isaacs Tr., 47:7-18) (emphasis added.) Such statements of opinion to non-customers are not actionable under the Lanham Act as a matter of law. *Cancer Genetics*, 2008 WL 323738 at *10; *Coastal Abstract Service*, 173 F.3d at 731.

C. This Court Lacks Jurisdiction Without The Lanham Act Claims.

LT Game International acknowledges, as it must, that if its Lanham Act claim is dismissed, this Court lacks subject matter jurisdiction over the remaining case. (Opp., 21:17-18.) Nevertheless, LT Game International encourages this Court to exercise jurisdiction regardless of the futility of its sole federal claim giving this Court jurisdiction. It should not.

As the Supreme Court has found, "[i]f the federal claims are dismissed *before trial*, even though not insubstantial in a jurisdictional sense, *the state claims should be dismissed as well.*" *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726, 86 S. Ct. 1130, 1139 (1966) (emphasis added). While this Court may weigh a variety of factors in determining whether to retain jurisdiction over the remainder of the case, the guidance from the Supreme Court has indicated that those factors generally "will point toward declining to exercise jurisdiction over the

1 remaining state-law claims." *Carneigie-Mellon Univ. v. Cohill*, 383 U.S. 343, 350 n. 7, 108 S.Ct.
 2 614, 619 n.7 (1988). In the face of lacking subject matter jurisdiction, there is no reason for this
 3 Court to maintain the remaining state law claims.

4 While LT Game International argues that the case has been pending for over two years, it
 5 fails to acknowledge that due to the inadequacy of its own pleadings, the time for SHFL to file an
 6 answer has still not yet come to pass. Likewise, LT Game International's claim that it conducted
 7 discovery "in contemplation of the application and practice of the Federal Rules of Civil
 8 Procedure and Federal Rules of Evidence" is a non sequitor. LT Game International points to no
 9 Nevada rules that would impact its ability to prosecute its claims in state court. Similarly, LT
 10 Game International's complaint that it would have to hire alternative counsel if the remaining
 11 claims were sent to state court is disingenuous. LT Game International has employed more than
 12 competent local counsel from the inception of this litigation. In short, without the Lanham Act
 13 claim, this Court lacks jurisdiction and the case should be dismissed. *Gibbs*, 383 U.S. at 726.

14 **D. Irrespective Of The Pleading Deficiencies, LT Game International Still Fails**
 15 **To Present Admissible Evidence To Create Genuine Issues Of Material Fact.**

16 In order to survive summary judgment, LT Game International was required to present
 17 specific facts demonstrating that there is a factual dispute about a material issue." *Zoslaw v. MCA*
 18 *Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982). To satisfy this burden, LT Game International
 19 was required to do more than claim it will "discredit" SHFL's "evidence at trial and proceed in
 20 hope that something can be developed at trial in the way of evidence to support its claim." *T.W.*
 21 *Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (citing
 22 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)). In fact, LT Game International was
 23 required to produce "significant probative evidence" to support its claims. *Id.* A "mere existence
 24 of a scintilla of evidence" is not enough. *United States ex rel. Anderson v. N. Telcom, Inc.*, 52
 25 F.3d 810, 815 (9th Cir. 1995). LT Game International has failed to satisfy its burden of
 26 demonstrating that a reasonable jury could possible find in its favor, warranting summary
 27 judgment as to any claims not dismissed under Rule 12(b). *Id.*

1 **I. Self-Serving, Double and Triple Hearsay Testimony Is Not Admissible,**
 2 **Nor Sufficient to Avoid Summary Judgment.**

3 By and large, LT Game International's Opposition attempts to present the appearance of a
 4 genuine issue of material fact based on the testimony and declarations of its sole principal, Frank
 5 Feng, and his brother-in-law benefactor, Jay Chun. [REDACTED]

6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED] (See, e.g., Dkt. 97 Feng Decl., ¶¶ 8, 10-11; Opp., Ex. 1, Feng Tr., Vol. I, 139:25-
 9 140:6, 147:15-148:2; Opp., Ex. 10, Feng Tr., Vol. II, 125:6-126:12.) LT Game International
 10 openly admits that this testimony is replete with hearsay. (See Opp., 21:6-10.) Nevertheless,
 11 contrary to LT Game International's belief and misunderstanding of the law, hearsay evidence is
 12 not generally admissible at the summary judgment stage and cannot be considered. *Romero v.*
 13 *Nevada Dept. of Corrections*, CV-808-JAD-VCF, 2013 WL 6206705, *3 (D. Nev. Nov. 27, 2013)
 14 (citing *Orr v. Bank of America*, 285 F.3d 764, 773-74 (9th Cir. 2002) ("A trial court can only
 15 consider admissible evidence in ruling on a motion for summary judgment."); see also
 16 *Hollingsworth Solderless Terminal Co. v. Turley*, 622 F.2d 1324, 1335 n.9 (9th Cir. 1980).

17 LT Game International argues that it can circumvent the law by presenting admittedly
 18 inadmissible evidence and claim that it can possibly present that evidence in an admissible form
 19 at trial. (Opp., 20:22-21:10.) Of course, under that theory and misinterpretation of the law,
 20 summary judgment could never be granted because the nonmoving party could *always* claim that
 21 it is *possible* that it will secure and present evidence at trial. Simply put, LT Game International
 22 is wrong on the law.

23 It is true that, "[t]o survive summary judgment, a party does not necessarily have to
 24 produce evidence in a form that would be admissible at trial." *Fraser v. Goodale*, 342 F.3d 1032,
 25 1036 (9th Cir. 2003). However, the evidence in question *must be capable* of being presented "in
 26 an admissible form at trial." *Fonseca v. Sysco Food Servs. of Ariz., Inc.* 374 F.3d 840, 846 (9th
 27 Cir. 2004). This does not mean that every piece of "evidence" is automatically considered.
 28

1 The case of *Fraser v. Goodale*, 342 F.3d 1032 (9th Cir. 2003) is instructive. There, the
2 Ninth Circuit considered whether plaintiff had presented sufficient evidence to preclude entry of
3 summary judgment. The evidence in question was plaintiff's own deposition testimony, which
4 included testimony from the witness reading certain portions of her diary. Defendant argued that
5 the contents of the diary were inadmissible hearsay and thus could not be considered for purposes
6 of the motion. The Ninth Circuit ultimately disagreed because, although the contents of the diary
7 may have been inadmissible hearsay, plaintiff would be able to testify about the same things from
8 memory at trial such that the evidence being offered (plaintiff's own testimony) would not
9 constitute hearsay. In other words, although the contents of the diary may have been
10 inadmissible, plaintiff's testimony about the contents could be presented in an admissible form at
11 trial – namely, through her own testimony. The Ninth Circuit thus instructed the trial court to
12 consider the testimony for purposes of summary judgment.

13 Unlike the plaintiff in *Fraser* who was able to personally testify to the contents of her
14 diary after refreshing her recollection, Feng and Chun will *never* be able to testify as to what third
15 parties allegedly heard from someone at SHFL. This testimony contains double hearsay that does
16 not fall under any exception, and is therefore inadmissible for any purposes during summary
17 judgment. *Lucey v. City of Reno*, 3:04-CV-00637-BES-PAL, 2008 WL 821585, at n.2 (D. Nev.
18 Mar. 27, 2008) ("double hearsay cannot be considered on a motion for summary judgment");
19 *Sobel v. Hertz Corp.*, 291 F.R.D. 525, 533 (D. Nev. 2013). Unlike the evidentiary objections to
20 plaintiff's testimony in *Fraser* that could be cured at trial, it is impossible for LT Game
21 International to cure the evidentiary defects in the proffered Feng and Chun testimony.

22 Similarly, Feng's declaration is likewise inadmissible as it is not based on personal
23 knowledge. Federal Rule of Civil Procedure 56(c)(4) "requires that supporting and opposing
24 affidavits be made on personal knowledge of the affiant, set forth facts that would be admissible
25 in evidence, and show affirmatively that the affiant is competent to testify to the matters stated
26 therein." *Scharf v. U.S. Atty. Gen.*, 597 F.2d 1240, 1243 (9th Cir. 1979); Fed. R. Civ. P. 56(c)(4);
27 *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 957 F.Supp. 1184, 1193 (D. Nev. 1997) ("Affidavits
28

1 that do not affirmatively demonstrate personal knowledge" are insufficient to avoid entry of
2 summary judgment.)

3 Feng has previously testified that [REDACTED]
4 [REDACTED]

5 [REDACTED] (Ex. I, Feng Tr., Vol. I, 137:2-138:2 [REDACTED])

6 Nevertheless, LT Game International claims that Feng's statements in his contradictory
7 declaration about what others heard should preclude summary judgment. They do not. Feng
8 lacks the competence and personal knowledge required under Rule 56(c)(4) to provide testimony
9 through a declaration as to what SHFL purportedly said to non-parties to this litigation and the
10 declaration must be disregarded. *Rebel Oil Co.*, 957 F.Supp. at 1193⁸

11 **2. Allegations Regarding G2E Asia Do Not Raise an Issue of Material Fact.**

12 Seemingly recognizing that the purported false statements cannot serve an actionable basis
13 for any of its claims, LT Game International tries to expand upon its common law unfair
14 competition claims by claiming that SHFL engaged in unfair acts at G2E Asia 2012. None of the
15 "evidence" presented by LT Game International supports its claims. Instead, the testimony
16 contained in the Opposition or that is otherwise part of the record reveals that any actions taken
17 regarding non-party LT Game's booth were carried out by other non-parties to this litigation.

18 Much of LT Game International's argument rests on the so-called "admissions" from
19 Isaacs as to his interactions with Reed Exhibitions ("Reed") at G2E Asia 2012. While the
20 Opposition repeatedly cites to this testimony claiming that it reflects SHFL giving an "ultimatum"
21 or "directive" to Reed and demonstrates an attempt to "circumvent" Macau law, the actual
22 testimony reveals no such thing. Instead, Isaacs testified that he [REDACTED]
23 [REDACTED]
24 [REDACTED]

25 [REDACTED] (Opp., Ex. 4, 74:19-21) (emphasis added.) There was no "ultimatum" as LT Game

26 ⁸ Pursuant to Federal Rule of Civil Procedure 56(c)(2), and for the reasons stated herein, SHFL hereby
27 objects to and moves to strike all portions of Feng's declaration that constitute hearsay and that are not
28 based on his own personal knowledge, specifically Paragraphs 8, 10-12, and 33.

1 International claims. LT Game International's attempts to rewrite Isaacs' testimony is telling of
2 the lack of evidence it has to offer this Court.

3 The evidence uncovered during discovery tells a greatly different story than the fantasy
4 weaved by LT Game International in its Opposition. Just before the start of the G2E Asia 2012,

5 [REDACTED]

6 [REDACTED]

7 [REDACTED] (Ex. J, Chun Tr., 53:7-9.)

8 [REDACTED]

9 [REDACTED]

10 [REDACTED] (*Id.*; Ex. K, Fahrenkopf Tr., 29:13-30:4, 62:5-12.)

11 [REDACTED]

12 [REDACTED]

13 [REDACTED] (Ex. H, Isaacs Tr., 71:5-8.) [REDACTED]

14 [REDACTED] (*Id.*, 73:5-9.) [REDACTED]

15 [REDACTED] (*Id.*, 72:6-9.)⁹

16 LT Game International is effectively seeking to hold SHFL responsible for the
17 independent actions of the G2E Asia show organizers relating to a non-party to this action. But
18 again, LT Game International has not presented any evidence whatsoever that SHFL directed, or
19 had any authority to direct, or was in any way involved in Reed's actions relating to non-party LT
20 Game's booth. By all accounts (and all evidence in this case), the decision came from the show
21 organizers themselves. As the President of the AGA, the co-promoter of the show, explained, [REDACTED]

22 [REDACTED]

23 [REDACTED]

24
25 ⁹ LT Game International's tortured interpretation and manipulation of the record renders it
26 unrecognizable. For the sake of clarity, Brandon Knowles testified [REDACTED]

27 [REDACTED] (Ex. L, Knowles Tr. 169:24-170:11.) He also
28 testified that [REDACTED]

[REDACTED] (*Id.*, 171:15-20.) There were no "ultimatums" or "demands" made
by any SHFL representatives, and certainly no "admissions" of wrongdoing.

(Ex. K, Fahrenkopf Tr., 37:16-18, 63:6-16.)

(*Id.*, 52:13-17.)

(*Id.*, 53:14-20.)

LT Game International cannot present any evidence that SHFL engaged in any unfair practices or that it made any "ultimatums" to anyone relating to what transpired at G2E Asia 2012. There is no factual dispute that any actions taken in relation to non-party LT Game's booth at the show was done by the show-organizers, *not* SHFL. These events do not lead to genuine issues of material fact, and if the Court chooses not to dismiss the unfair competition claims under Rule 12(b), it should grant summary judgment in favor of SHFL.

3. *LT Game International Has Not Presented Any Evidence Of Damage.*

In order to support *any* of its claims, LT Game International was required to present evidence that it suffered damage, such as evidence of lost contracts, as a result of SHFL's conduct rather than mere speculation. *Brooks Bros. v. Brooks Clothing of Cal.*, 60 F. Supp. 442, 447 (C.D. Cal. 1945) ("The law of damages . . . calls for proof of actual loss of sales in unfair competition."); *Southland Sod Famrs*, 108 F.3d at 1139; *Hilton Hotels Corp. v. Butch Lewis Productions, Inc.*, 862 P.2d 1207, 1210 (Nev. 1993); *In re Amerco Deriv. Litig.*, 252 P.3d 681, 702 (Nev. 2011). In fact, LT Game International was required to provide evidence of damage or harm "with *reasonable certainty* both as to their nature and in respect of the cause from which they proceed." *Union Oil Co. of California v. Hunt*, 111 F.2d 269, 277-78 (9th Cir. 1940) (emphasis added). It has done no such thing.

In support of its argument, LT Game International claims that it "lost" sales to [REDACTED] and that a sale to [REDACTED] has been delayed. Neither serve as a basis for damages in this case nor create a genuine issue of material fact. LT Game International's primary damage claim is based on a purported "lost" sale to the [REDACTED]. LT Game International has failed to present *any* evidence that such a deal was ever in the works

1 other than Feng and Chun's unsupported assertions. Highlighting the absurdity of basing any
2 damage claim on the supposed deal, [REDACTED]

3 [REDACTED]
4 [REDACTED] (Ex. J, Chun Tr., 62:20-63:5) (emphasis added). In essence, LT Game
5 International's claim for damage is predicated on Chun's claim of an *unspoken agreement* to sign
6 a deal. LT Game International presented no documents reflecting this potential deal, no e-mails
7 discussing this potential deal, no draft agreements, and no testimony from the [REDACTED]
8 demonstrating that any such deal was ever in the works. Nevertheless, LT Game International
9 asks this Court to take its word that it had a deal in place and that the deal was lost because of
10 SHFL. It takes far more than rank speculation and conjecture to survive summary judgment. *See*
11 *Brooks Bros.*, 60 F. Supp. at 447 (unfair competition claims require actual proof of loss).

12 Grasping at straws, LT Game International also claims, without any support other than
13 Feng's accusations that it had a deal with [REDACTED] that is now "delayed" because of "distaste over
14 LT Game International's rumored plan to call him as a witness in this case." (Opp., 12:2-3, 19:25-
15 28.) Setting aside that LT Game International acknowledges that such a deal is not lost, LT Game
16 International has in fact listed [REDACTED] as someone "likely to have
17 knowledge of discoverable information *that plaintiff may use to support [] its claims or*
18 *defenses*" as part of its FRCP 26(e) disclosures. (Ex. B, Sauer Decl. at B-1, p. 3) (emphasis
19 added). When SHFL's sales representative inquired with him as to his being listed on LT Game
20 International's disclosures, as he indicated he had no knowledge of LT Game International's
21 claims. (Ex. B, Sauer Decl. at ¶ 6.) Based on his request, SHFL's representative provided him
22 with a copy of LT Game International's disclosures, and [REDACTED] thanked her for doing so. (*Id.*
23 at ¶¶ 8-9.) LT Game International has presented no evidence that anything SHFL has done has
24 ever led to a lost sale with either the [REDACTED]

25 4. *Settlement Offers Do Not Raise Genuine Issues of Material Fact.*

26 In another bizarre turn, LT Game International points to settlement offers between a SHFL
27 subsidiary and non-party LT Game as purported "evidence" of unfair competition. (Opp., 5:16-
28 23.) LT Game International alleges that SHFL attempted to [REDACTED]

(*Id.*; Ex. J, Chun Tr. at 48:11-50:19.)

(*Id.*) As for the second round of settlement discussions,

(*Id.*, 70:8-71:25.) Not even

Chun testified that he felt threatened or coerced into doing anything, and he never did.

Even if the settlement discussions between non-party LT Game and SHFL's subsidiary were relevant, which they were not, they certainly do not constitute evidence of unfair competition. Of course, "Federal Rule of Evidence 408 bars the admission of settlement agreements to prove liability." *Brocklesby v. United States*, 767 F.2d 1288, 1292 (9th Cir. 1985). This is because "[t]wo principles underlie Rule 408: (1) '[t]he evidence [of compromise] is irrelevant, since the offer may be motivated by desire for peace rather than from any concession of weakness of position;' (2) '[a] more consistently impressive ground is promotion of the public policy favoring the compromise and settlement of disputes.'" *Hudspeth v. C.I.R.*, 914 F.2d 1207, 1213-14 (9th Cir. 1990)(quoting Fed. R. Evid. 408 advisory committee's note). Accordingly, LT Game International's description of these settlement discussions and offers is not only irrelevant, but also inadmissible to demonstrate liability in any event.

5. **Declaration Fails to Raise a Genuine Issue of Material Fact.**

LT Game International's effort to concoct an issue of fact by way of a declaration from [REDACTED] as to a conversation that took place months after the close of discovery is equally misplaced.¹⁰ First, the declaration does not support LT Game International's argument that it suffered damages by entering into an indemnification agreement with [REDACTED] as a result of anything SHFL did or said. Such a claim is directly contrary to the position LT Game International raised in a separate action in the District of New Jersey where it claimed a third

¹⁰ As LT Game International seeks to proffer and rely upon evidence relating to events that purportedly took place well after the close of discovery, SHFL will necessarily seek to depose [REDACTED] in advance of trial if the claims are not adjudicated by way of this Motion. Similarly, as LT Game International seeks to rely upon declarations from individuals that are purported experts on patent law (Meredith) and Macau law [REDACTED] SHFL would likewise seek to depose these previously undisclosed experts or otherwise have any such declarations or testimony presented by them excluded from the record.

1 party, DEQ, made false statements that damaged its relationship with Commerce. (Ex. M, DEQ
 2 Compl.); *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 600 (9th Cir. 1996)
 3 (judicial estoppel "precludes a party from gaining an advantage by taking one position, and then
 4 seeking a second advantage by taking an incompatible position"). Further, these types of
 5 indemnification provisions are common in the industry. (Ex. F, Rumbolz Tr. 84:14-23.) In fact,
 6 [REDACTED] (Ex. A, Snow
 7 Decl., ¶ 10.) For LT Game International to claim damage as a result of the inclusion of an
 8 industry standard provision in a contract is preposterous.

9 [REDACTED]
 10 [REDACTED] (*Id.*, ¶ 5-9.) [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED] (*Id.* at ¶¶ 5-6, 9.) Even if those discussions could somehow be misconstrued as
 14 "threats," there is still no evidence to support that any statements were made in "bad faith" as
 15 would be required to support a claim for unfair competition. *See Fisher Tool Co., Inc. v. Gillet*
 16 *Outillage*, 530 F.3d 1063, 1068 (9th Cir. 2008). In order to support such a claim, LT Game
 17 International would have to produce evidence that go beyond the mere allegation of enforcement
 18 of intellectual property rights. *See Cummins-Allison Corp. v. Glory, Ltd.*, 02 C 7008, 2003 WL
 19 22169756 (N.D. Ill. Sept. 18, 2003). LT Game International has not presented any such evidence.

20 In fact, a party with a pending patent application is required to notify potential infringers
 21 of that fact in order to enforce certain rights in the future. *See* 35 U.S.C. § 154(d); *see also*
 22 *Mikohn Gaming Corp. v. Acres Gaming, Inc.*, 165 F.3d 891, 897 (Fed. Cir. 1998) ("[I]t is not
 23 improper for a patent owner to advise possible infringers of its belief that a particular product may
 24 infringe the patent.") Notably, SHFL owns patents and other intellectual property rights
 25 associated with features on, related to, and associated with its SHFL Fusion product.¹¹

26
 27 ¹¹ *See* U.S. Pat. No. 6,789,801 (Baccarat Side Wager Game); U.S. Pat. No. 7,309,065 (Interactive
 28 Simulated Baccarat Side Bet Apparatus and Method); U.S. Pat. No. D615,600 (Card Dealing Dispenser);
 U.S. Patent No. D646,338 (Card Dealing Dispensing Cartridge); U.S. Patent No. 7,407,438 (Modular

1 **6. LT Game International's Experts Do Not Raise Issues of Material Fact.**

2 Seeking to avoid summary judgment at all costs, LT Game International makes the bald
3 assertion that simply because it has proffered two witnesses as experts, summary judgment is not
4 appropriate. Again, that is not the law. "[A] party may not avoid summary judgment solely on
5 the basis of an expert's opinion that fails to provide specific facts from the record to support its
6 conclusory allegations." *Evers v. General Motors*, 770 F.2d 984, 986 (11th Cir. 1985); *In re Apple*
7 *Computer Sec. Litig.*, 886 F.2d 1109, 1116 (9th Cir. 1989) ("[W]here the evidence is as clear as
8 that in this record, the court is not required to defer to the contrary opinion of plaintiffs' 'expert.'")

9 LT Game International's experts fail to support any conclusions relating to liability or even
10 damages. Instead, both of LT Game International's experts admit that they [REDACTED]

11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED] (See Dkt. 91, Meister Decl., Ex. 1 at 2; Dkt. 92, Giuffre Decl.,
15 Ex. 1 at 3.) LT Game International cannot hide behind its experts' regurgitation and assumption
16 of allegations as purported "evidence" of liability or damages to avoid summary judgment. *See In*
17 *re Trasyol Prods. Liability Litigation*, 709 F. Supp. 2d 1323, 1346 (S.D. Fla. 2010) (refusing to
18 consider proffered expert that merely "regurgitates" facts and then reaches conclusory opinions
19 assumes the role of advocate and invades the province of the trier of fact).

20 **E. LT Game International Lacks Standing.**

21 Although LT Game International seeks to brush it aside, the simple truth is that it lacks
22 standing to maintain this action in the first instance. LT Game International has presented no
23 evidence that it has suffered a non-speculative "injury in fact" as it admits that it was never going
24 to enter into any agreements at issue in this litigation in the first place, another company was.
25 (Ex. N, Feng Tr., Vol. II, 22:7-12.) Such an admissions strips LT Game International of Article
26 III standing. *See Henry v. Circus Circus Casinos, Inc.*, 223 F.R.D. 541, 543 (D. Nev. 2004).

27
28 Dealing Shoe for Casino Table Card Games); U.S. Patent No. 7,434,805 (Intelligent Baccarat Shoe); U.S.
Pat. App. No. 2013/0184044.

1 LT Game International similarly lacks prudential standing. Even under its own version of
 2 the facts, LT Game International bases its claims on SHFL's purported statements regarding LT
 3 Game and its products. As such, any alleged harm to LT Game International (the sole Plaintiff in
 4 this action) is derived through its relationship with its licensor, LT Game. As explained in the
 5 Motion, LT Game International is no different from any of the at least five other entities who have
 6 distributed LT Game's products or services. (Ex. N, Feng Tr., Vol. II, 27:6-17; Ex. O, [REDACTED]
 7 [REDACTED] Ex. P, [REDACTED]) Under LT Game International's theory, each and every
 8 entity would have independent standing to assert "claims on behalf of itself" and seek damages
 9 based upon its status as an LT Game licensee, wherever that may be on the licensee food chain.
 10 This theory has been expressly rejected by other courts. *Conte Bros. Auto., Inc. v. Quaker State-*
 11 *Slick 50, Inc.*, 165 F.3d 221 (3d Cir. 1998); *Famous Horse Inc. v. 5th Ave. Photo Inc.*, 624 F.3d
 12 106, 118 (2d Cir. 2010).

13 III. CONCLUSION

14 Try as it may, LT Game International has no basis to assert any claims against SHFL.
 15 While LT Game International seeks to point the finger at SHFL for its failure to secure more
 16 placements in the United States and abroad, it has no evidence to support such a claim. That is
 17 because there is none. LT Game International's distortion of testimony of SHFL's representatives
 18 and conclusory, hearsay assertions do not save its futile claims. In light of the foregoing
 19 deficiencies, this Court should dismiss the latest complaint in its entirety or otherwise dispose of
 20 the claims by summary judgment.

21 DATED this 27th day of June, 2014.

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CERTIFICATE OF SERVICE

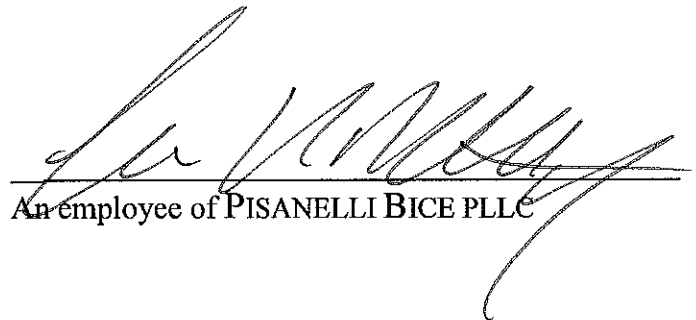
I, the undersigned, hereby certify that on the 27th day of June 2014, I electronically filed the foregoing **REPLY IN SUPPORT OF MOTION TO DISMISS THIRD AMENDED COMPLAINT, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT** using the Court's CM/ECF system which will send notification to the following:

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